(10)

Supreme Court, U.S.
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No.00-1260

In The

Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

MARK JAMES KNIGHTS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY, CALIFORNIA, IN SUPPORT OF RESPONDENT

Kenneth I. Clayman, Public Defender
with Michael C. McMahon, Chief Deputy
County of Ventura, California
800 South Victoria Avenue
Ventura, CA 93009
(805) 477-7114

Counsel for Amici Curiae

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18 pp

QUESTION PRESENTED

If police conduct a search for ordinary law enforcement purposes and one of the persons searched is on probation and has been ordered by the sentencing court to "submit" to government searches, does the exclusionary rule still apply in any new criminal prosecution?

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In The
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BRIEF AMICI CURIAE OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY, CALIFORNIA

INTEREST OF AMICI CURIAE

The California Public Defenders Association (CPDA) is one of the largest associations of criminal defense lawyers in the nation. CPDA presents over twenty educational programs each year on topics related to criminal justice. CPDA has an active amicus committee and frequently participates as amicus in criminal justice cases. (See, e.g., *California v. Trombetta*, 467 U.S. 479 (1984); *Monge v. California*, 524 U.S. 721 (1998); *Stone v. Powell*, 428 U.S. 465 (1976).)

The Public Defender of Ventura County is an active participant in CPDA. Two of the attorneys in the office have served as President of CPDA; Public Defender Kenneth I. Clayman and Chief Deputy, Michael C. McMahon. The office of

the Public Defender of Ventura County has some fifty defense lawyers involved in every aspect of criminal defense practice. Public Defender Clayman is aware of the history of California probation law and the pragmatic demands of the probationary supervision.[1]

The California Public Defenders Association and the Public Defender of Ventura County are in the front lines of a daily battle over the future of the Fourth Amendment in this state. The vast majority of persons arrested following a probation search end up represented by a California public defender.

SUMMARY OF FACTS AND CASE

Amici conclude the summary of facts of the case set forth by respondent in his brief are complete, accurate, and non-misleading. Some facts are worthy of repeating. A California judge sentenced Knights to unsupervised probation for a misdemeanor conviction. As a condition of that probation, the judge ordered Knights to "submit" to governmental searches. Knights acknowledged the order and agreed to abide. He signed a copy and complied with the order to submit. Later, in a new criminal prosecution, Knights moved to suppress evidence seized in a search on the grounds it was a warrantless search conducted for ordinary law enforcement purposes. The Ninth Circuit and the District Court agreed that the

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1 This brief was written entirely by counsel for amici without assistance or contributions from any party. Both parties gave written consent to the filing of this brief.

misdemeanor probation order did not render the exclusionary rule inapplicable to the new prosecution. Knights fully submitted to the search as he was ordered to do by the state court. Amici see nothing in the record suggesting Knights' motion to suppress evidence in a new criminal prosecution in federal court constitutes a violation of the earlier state court order to submit to the search itself.

THE MAGNITUDE OF THE PROBLEM - CALIFORNIA'S FOURTH AMENDMENT CRISIS

California is the most populous state in the country with many people on actively supervised probation. California courts have placed countless more persons on unsupervised probations or "conditional sentences." Many of these unsupervised probations have some form of probation search condition.

California has no standard probation search condition. Each judicial officer enjoys broad discretion to draft conditions of probation unique to the individual case. Some conditions authorize limited searches for computers, stolen vehicles, narcotics, or deadly weapons. Others, as in this case, merely order the probationer to submit whenever a law enforcement officer wishes to search him. (See, e.g., *People v. Kurey*, 88 Cal.App.4th 840 (Mar. 28, 2001).)

Many California law enforcement agencies have databases listing persons on probation or with a probation search condition. Many databases are not designed to alert officers to the limitations of the specific condition. (See, *People v. Spence*, 78 Cal.App.4th 1242 (2000), rev. grntd. and pending in S087865.)

California's implementation of "probation searches" has undermined the Fourth Amendment rights of all. These searches take place in homes shared with non-probationers, hotels, offices, and on the streets. Most traffic stops are now prolonged by an interrogation of all passengers about their probationary status. Unfruitful interrogations are further prolonged by routine solicitations of consent to search. (See, e.g., *People v. Russell*, 81 Cal.App.4th 96, 105 (2000) "The officer at one point asserted a privilege when asked about African-Americans, then said two men traveling alone may constitute a possible drug indicator regardless of race, but Hispanics were considered to be in primary control of the drug market.") Racial profiling does further damage. The California Legislature passed a bill aimed at eliminating racial profiling by a two-thirds majority. It was vetoed by California Governor Gray Davis.

Disagreement over abuses of such search conditions have bitterly divided the California Supreme Court. ("For my part, I would leave the Fourth Amendment alone, and simply declare what I believe to be implied under state law, namely, that a probationer's consent to searches and seizures is limited to such as may be conducted for the purpose of ensuring his compliance with his probation and its terms.") (*People v. Robles*, 23 Cal.4th 789, 802 (2000) Mosk, J., conc. opn.; "...the Fourth Amendment does not permit "police to use a probation search condition, which authorizes the warrantless, suspicionless search of a probationer, as authority to search a home for the express purpose of seeking evidence against nonprobationers who share the residence with the probationer." (*Id*, at

p.803, Kennard, J., conc.).) California courts have concluded that an officer's improper subjective motivations, which are irrelevant when the officer is armed with probable cause, are also irrelevant when the subject's probation has some search condition. As they see it, this conclusion is compelled by this Court's holding in *Whren v. United States*, 517 U.S. 805 (1996); "By succumbing to the trap of the facile formula that beguilingly substitutes for critical analysis, the court in *Tyrell J.* reached a constitutionally suspect conclusion. For that reason, we should avoid endorsing, and thus perpetuating, its dubious reasoning." (*Id.*, at p. 806, Brown, J. , opn.)

SUMMARY OF THE ARGUMENT

Being released on parole is different than being a prison inmate. Being sentenced to probation is different than being released on parole after a prison sentence. The reasonable expectations of privacy of inmates, parolees, and probationers are different.

Probation is the primary method of sentencing offenders. Court-supervised probations are common for less-serious offenses. Courts are well-equipped to apply a special needs analysis to the monitoring of persons released on court-supervised probation. Suspicionless or warrantless searches for ordinary law enforcement purposes violate the Fourth Amendment. A theory that probationers "consent" to unreasonable conduct beyond that necessary under the special needs doctrine is both unworkable and undesirable. Police conduct suspicionless searches in hopes that one of the persons

searched may be on probation with some form of search condition. Many non-probationers suffer.

The state court order to submit to all future searches does not preclude Knights', post-search, federal court challenge to the constitutionality of this search.

ARGUMENT

I.
THE "CONSENT" THEORY IS UNHELPFUL. THE MAJORITY OF CALIFORNIA PROBATIONERS ARE ON PROBATION BECAUSE PROBATION IS THE APPROPRIATE SENTENCE UNDER CALIFORNIA LAW.

Some suggest that California probationers voluntarily consent to onerous conditions of probation to avoid prison. But, the majority of California probationers are granted probation because it is the appropriate sentence under California law. California has neither the inclination nor the resources to imprison needlessly. Both the offender and the state benefit from the grant of probation in appropriate cases. Victims of crime receive restitution from working probationers.[2]

The California Penal Code and Rules of Court virtually mandate probation for eligible and deserving offenders. (See, California Rules of Court, Rule 4.414, and California Penal Code, §

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2 In November of 2000, California voters enacted Proposition 36. The new state law mandates probation and treatment for most drug offenses. Ballot materials suggest the change will benefit the public at large.

1203(a).) If the facts relating to the nature, seriousness, and circumstances of the crime and the defendant warrant a grant of probation, a prison sentence is an abuse of sentencing discretion. (*People v. Bloom*, 142 Cal.App.3d 310, 322 (1983) [error to deny probation based solely upon a fact inherent to the commission of all cases involving that offense, such as the "vulnerability" of victims of drunk drivers] cf., *Charles S. v. Superior Court*, 32 Cal.3d 741 (1982) [abuse of discretion to deny informal probation to juvenile because of his inability to pay restitution.].)

The contention that probationers voluntarily consent to unreasonable conditions of probation to avoid an inappropriate prison sentence is a fiction. The court may impose reasonable terms of probation without the consent of the defendant. If the defendant makes a specific and timely objection to the condition, the condition may be challenged on appeal. Appeal is not barred on a theory of invited error, waiver, or consent. (*People v. Welch*, 5 Cal.4th 228 (1993).)

In extreme and isolated cases, if a defendant believes that probation with an unreasonable condition is harsher than imprisonment, he may demand imprisonment if he does so promptly. (See, *In re Osslo*, 51 Cal.2d 371 (1958).)

Generally, the California appellate courts will strike inappropriate conditions of probation, despite the fact the defendant "consented" to probation. (*People v. Williams*, 144 Cal.App.2d 144 (1956) [prolonged suspension of driver's license]; *People v. Hackler*, 13 Cal.App.4th

1049, 1060 (1993)[requiring probationer to wear a shirt branding him as a probationer].)

This court should invalidate probation search conditions crafted to facilitate ordinary law enforcement. Such conditions are over broad and unreasonable under the Fourth Amendment.

II.

A SEARCH BASED UPON A CONDITION OF PROBATION SHOULD BE ANALYZED UNDER THE "SPECIAL NEEDS" DOCTRINE, RATHER THAN A FICTIVE "CONSENT" OR "WAIVER" THEORY. THE SPECIAL NEEDS DOCTRINE REQUIRES REASONABLE GOVERNMENT ACTION. FOR POLICY PURPOSES, A PROBATIONER SHOULD NOT BE ALLOWED TO CONSENT TO UNREASONABLE GOVERNMENT ACTION OR WAIVE THE REQUIREMENT THAT THE GOVERNMENT ACTION BE REASONABLE.

In limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when "special needs" other than the normal need for law enforcement provide sufficient justification. (*Ferguson v. City of Charleston*,____ __ ___ U.S. ___, 121 S.Ct. 1281, 1286, n. (2001); see also *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-53 (1995); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).)

The special needs doctrine "is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing." (*City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (Rehnquist, J., diss. opn.).)

Although a search of a probationer may be justified by the special needs doctrine, the search of Knights' apartment by the Napa County Sheriff Detective is not so justified. The district court's finding of fact that the search was conducted for the purpose of ordinary law enforcement is supported by record.

Petitioner is forced to rely on a consent theory. The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and "[v]oluntariness is a question of fact to be determined from all the circumstances," (*Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).)

Yet the petition for certiorari complains of "substantial disruption of law enforcement efforts in California" because of confusion regarding searches based upon a search condition in a probation order.

Use of the "special needs" doctrine would allow this court to articulate guidelines of reasonableness that would do much to minimize confusion and resulting disruption. Use of a fictive "consent" or "waiver" theory, on the other hand, will maximize both confusion and disruption because California has no regulatory scheme governing probation searches and no standard term of probation specifying the scope of searches authorized. Consequently, each sentencing judge is free to create his own, case-specific search condition in each grant of probation.

Therefore, the "totality of circumstances" in each case will present a unique result regarding the scope and voluntariness of any alleged "consent" or "waiver." By using a "consent" analysis of probation searches, rather than a

"special needs" analysis, California courts have created the very confusion and disruption decried in the petition for certiorari. A special needs approach will reduce the number of violations of Fourth Amendment rights of both probationers and those in propinquity to them.

A probation search term should be rationally related to the probation itself. Federal courts have reached the same conclusion. In *U.S. v. Stoural*, 990 F.2d 372 (8th Cir.1993), for example, Stoural was convicted pursuant to his guilty plea of conversion of collateral pledged to Farmers Home Administration and sentenced to five years probation and full restitution. Stoural appealed and the Court of Appeals held that conditions of probation prohibiting defendant from purchase, possession, and use of any alcohol and subjecting him to warrantless searches for alcohol and drugs at any time were not reasonably related to crime to which he plead guilty and would be vacated.

Although the Eighth Circuit relies on federal statutes, the statutes, like California case law, require that probation conditions be reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing. (Accord, *United States v. Prendergast*, 979 F.2d 1289, 1293 (8th Cir.1992).)

Under a "consent" or "waiver" analysis, *Stoural* and *Prendergast* could be lawfully searched under these unlawful conditions of probation under a theory they waived the protections of the Fourth Amendment and the federal statutes and consented in advance to the search. A special needs analysis, on the other hand, exposes the unlawful scope of the condition.

The use of consent analysis by the California courts has been criticized. ("From its consent rationale to its reliance on *Whren v. United States* (1996) 517 U.S. 806, the majority opinion is fatally flawed at every turn: on the law, on the facts, on principle.* * *. By their decision today, a majority of this court set the history of personal liberties back more than 200 years and resurrect a specter of the general warrants and writs of assistance so abhorred in England and the American Colonies the very impetus of the Fourth Amendment.") (*People v. Woods*, 21 Cal.4th 668, 683 (1999), Brown, J. diss. opn.) Justice Brown's dissenting opinion in *Woods* also notes that a police officer who does not conduct a search for a valid probationary purpose is not engaged in otherwise lawful conduct, thereby vitiating the consent justification.

Even the confused California courts have realized that advance consent to unreasonable police conduct may be contrary to the public interest (*People v. Freund*, 48 Cal.App.3d 49 (1975) [probationers' consent to waive the right to "knock and notice" procedures condones violations of law by law enforcement officers and is not reasonably related to the authority of the court to grant probation.].)

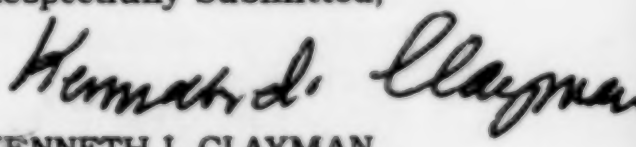
The "required advance consent" theory is a tool, poorly designed for a complicated job. The guidance of this Court is necessary to restore common-sense and reasonableness to an important social problem.

CONCLUSION

A California judge sentenced Knights to unsupervised probation for a misdemeanor conviction. As a condition of that probation, the judge ordered Knights to "submit" to governmental searches. Knights acknowledged the order and agreed to abide. He signed and complied with the order to submit. Later, in a new criminal prosecution, Knights moved to suppress evidence seized in a search on the grounds it was a warrantless search conducted for ordinary law enforcement purposes. The Ninth Circuit and the District Court agreed that the misdemeanor probation order did not render the exclusionary rule inapplicable to the new prosecution. That conclusion was correct and the decision should be affirmed.

August 22, 2001

Respectfully Submitted,



KENNETH I. CLAYMAN,
with MICHAEL C.
MCMAHON

Attorneys for Amici Curiae
California Public Defenders Association and
Public Defender of Ventura County, California